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No. 86-49

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,
v.
KENTUCKY PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICI CURIAE*

and

BRIEF OF EASTERN UTILITIES ASSOCIATES AND NORTHERN STATES POWER COMPANY (MINNESOTA) AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICI CURIAE*

Pursuant to Rules 29, 36 and 42 of the Rules of the United States Supreme Court, Eastern Utilities Associates ("EUA") and Northern States Power Company (Minnesota) ("NSP") respectfully move for leave to file the attached brief as *amici curiae*.[1]

REQUEST FOR LEAVE TO FILE OUT OF TIME

At the outset, EUA and NSP recognize that the deadline for making their motion expired several months ago. EUA and NSP respectfully urge that they be permitted to file the attached brief out of time and, in support, state as follows:

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[1] Petitioners consent to the filing of this brief by EUA and NSP and have filed their letter of consent with the Clerk of this Court. Respondents do not consent to the filing of this brief.

EUA is the registered utility holding company of an electric system in Massachusetts and Rhode Island. NSP owns an electric utility system serving in five states in the upper Midwest.[2] Both the EUA and NSP systems rely upon rate schedules filed at the Federal Energy Regulatory Commission ("FERC") to obtain an allocation of system power supply costs among their constituent parts and upon the "filed rate" doctrine under the Federal Power Act to achieve recognition in retail ratemaking of the FERC-filed allocation. Therefore, EUA and NSP are in a position to be substantially affected by the Court's decision in this case, which involves the question of whether Federal courts may abstain from exercising jurisdiction to ensure that the "filed rate" doctrine is observed by state commissions.

Neither EUA nor NSP was a party to the proceeding below. They recently became aware that action on the petitions for writ of certiorari was awaiting submission of the views of the Solicitor General. Considering that the submission of an *amici curiae* brief apparently would not interfere with the processing of the petitions, they promptly filed the attached brief urging grant of certiorari.

Permitting EUA and NSP to file their motions out of time will not prejudice the Court or any party. EUA and NSP do not seek a delay in the normal course of review by this Court. EUA and NSP will, if permitted to file their brief, observe any future deadlines that the Court may establish. The attached brief does not require special research or background work.

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[2] The only affiliates of EUA that are not wholly owned are four nuclear generating companies: Yankee Atomic Electric Company, Connecticut Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Maine Yankee Atomic Power Company. The only affiliates of NSP that are not wholly owned are Chippewa and Flambeau Improvement Company and Eloigne Company.

SPECIAL INTERESTS OF EUA AND NSP

As the attached brief demonstrates, the EUA and NSP systems have been involved in cases in which state commissions in retail ratemaking have sought to disallow costs incurred under FERC-filed rate schedules. In those cases, each system has had recourse to the courts to enforce rights under the Federal Power Act. They may have need for such recourse again.

If Federal courts are permitted to abstain from deciding issues of preemption and burden on interstate commerce, EUA and NSP will have to depend exclusively on state commissions and state courts for protection of their rights. In certain circumstances, they perceive that effective relief may be available only in the Federal courts.

EUA and NSP believe that they can provide expertise and insight as to the importance of these issues to electric utility systems which will be directly affected by the Court's decision in this case. The attached *amici curiae* brief demonstrates the significance of these issues to EUA and NSP and provides background as to why their participation in this case may be helpful in this Court's decisionmaking process.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, EUA and NSP respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae* out of time.

Respectfully submitted,

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BRIEF OF EASTERN UTILITIES ASSOCIATES AND NORTHERN STATES POWER COMPANY (MINNESOTA) AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

Eastern Utilities Associates ("EUA") is the registered utility holding company of an electric system in Massachusetts and Rhode Island. In the EUA system, all generation and transmission service is rendered by a power supply subsidiary. This company sells power at wholesale to two distribution companies within the system that resell the power at retail. Each distribution company serves in a separate retail jurisdiction.

Northern States Power Company (Minnesota) ("NSP") owns an electric utility system serving in five states.

NSP directly serves in Minnesota, North Dakota and South Dakota. A wholly owned subsidiary, Northern States Power Company (Wisconsin), serves in Wisconsin and Michigan. In the NSP system, the generation and transmission facilities are owned by the company in whose service area they are located.

While the EUA and NSP systems are organized along different lines, they have this in common: they both rely upon rate schedules filed at the Federal Energy Regulatory Commission ("FERC") to obtain an allocation of system power supply costs among their constituent parts and upon the "filed rate" doctrine under the Federal Power Act to achieve recognition in retail ratemaking of the FERC-filed allocation.[1]

For both the EUA and NSP systems, the end results of the FERC-filed allocation are homogenized, or equalized, power supply costs for the constituent retail companies of the system—that is to say, identical unit costs of power supply throughout the system. For an electric system that is planned and operated as a single integrated system for the benefit of customers as a whole, there is strong engineering and economic justification for this approach.[2]

The EUA system and the NSP system each has invoked the filed rate doctrine in court to preserve equalization of power supply costs. For both systems, the litigation arose

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[1] As it applies here, the "filed rate" doctrine holds that wholesale rates filed at FERC must be given binding effect by state utility commissions in setting retail rates. *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349, 2354 (June 17, 1986).

[2] In the EUA system, system power supply costs are equalized by having the system power supply company sell power to the two system distribution companies under a single wholesale rate. In the NSP system, power supply costs are equalized under a system interchange agreement pursuant to which the parent and its subsidiary sell power to each other at cost in such amounts that their unit costs are equalized.

from efforts to recover in retail rates the costs of abandoned nuclear construction projects. In the EUA and NSP abandonment cases at FERC, state commissions and other state agencies availed themselves of the opportunity to intervene on the merits of cost recovery. Subsequently, they collaterally challenged FERC's treatment of the cost recovery in retail proceedings. In EUA's case, a state commission declined to pass through to retail customers the abandonment costs that FERC had allowed to be collected in wholesale rates subject to investigation and refund.[3] In NSP's case, the regulatory commissions in the three states in which the parent renders service sought to avoid FERC-allowed abandonment costs of a project planned for construction by both companies in a fourth state, where the subsidiary serves.[4] On appeal of the state commission orders, the courts held in both cases that the commissions were bound to respect the FERC-filed rates.

As multi-state electric utility systems which allocate power supply costs under FERC-filed rate schedules, NSP and EUA obviously have an interest in the vitality of the "filed rate" doctrine. This Court's decision in *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (June 17, 1986), confirms that the "filed rate" doctrine applies to cost allocations among affiliates under FERC-filed rate schedules. However, as the phenomenal proliferation of litigation under the doctrine in the last few years vividly demonstrates, extensive efforts are underway to avoid and circumscribe the doctrine in particular

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[3] *Eastern Edison Co. v. Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1983).

[4] *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn.), *cert. denied*, 104 S.Ct. 3546 (1983); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981). See also: *South Dakota Public Utilities Commission v. FERC*, 690 F.2d 674 (8th Cir. 1982); *State of Minnesota v. FERC*, 734 F.2d 1286 (8th Cir. 1984).

cases. From this litigation it is evident that in some cases the parties must have access to the Federal courts to enforce their rights under the Federal Power Act, if the "filed rate" doctrine is to have practical meaning. Currently, some circuits permit access as a matter of right in "filed rate" doctrine cases and others, under abstention principles, deny it. This disarray among the circuits is fueling collateral challenges to FERC's decisions and generating litigation on all sides. A national rule is urgently needed.

STATEMENT OF THE CASE

EUA and NSP adopt the Petitioner's Statement of the Case.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

1. In the last several years, states have become suddenly active in efforts to have power supply costs—particularly from the more expensive sources of supply—allocated to other jurisdictions. The efforts, of course, may or may not be justified, depending on the circumstances of the particular case. But whatever the merits of the efforts, when the allocation is achieved under a rate schedule filed under the Federal Power Act, the proper forum is FERC, a neutral agency charged by Congress with deciding such issues under a standard of justness and reasonableness, specifically without preference to locality.[5]

The states' motives for attempting to keep power supply cost allocation issues away from FERC and within the affected states are, of course, understandable. As some of the recent litigation shows, allocation issues can become highly charged public and political issues in which

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[5] Section 205(b) of the Federal Power Act requires FERC to declare unlawful any "unreasonable difference" in rates "as between localities" 16 U.S.C. § 824d(b).

the interests of local jurisdictions clearly predominate over larger considerations of equity and interstate commerce. In such cases, various agencies of the state government, affected municipalities, elected officials and local industry groups join in the litigation. In effect, the jurisdiction mobilizes its resources to conduct a legal, political and publicity campaign in favor of cost avoidance. Counter-campaigns may be organized in other jurisdictions.

Whether the state courts can remain above the fray in these circumstances is at least questionable. Reading the cases, one might conclude that some state courts have done so and some have not. The Federal courts would seem to be especially suited to decide issues of this sort—resolving questions of competing state economic interests under Federal law. An abstention doctrine that allows Federal courts to avoid these cases and return them to the courts of the interested states strikes at a major purpose—perhaps the central purpose—of the Federal lower court system.

2. The deluge of "filed rate" doctrine cases is almost surely not a temporary phenomenon. It is true that the occasion for much of the recent "filed rate" litigation has been expensive construction programs that either have been abandoned before completion or brought to completion in the face of declining load growth. But in the background of this immediate development, which may abate over a period of four or five years, is a longer term development that promises not to abate but to grow steadily. This development consists of two related phenomena: (a) increased wholesale power sales as the network of extra high voltage transmission lines is built up throughout the nation and (b) the gradual introduction of increased competition into wholesale power supply markets. The first phenomenon allows utilities to sell power over wider geographic areas. The second brings into the wider wholesale power supply markets generat-

ing companies that may or may not be affiliated with traditional utilities, but whose rates, as wholesale rates, will be regulated by FERC.

Both phenomena foretell increased activity under FERC regulation. That activity will inevitably raise new legal and policy questions and pose issues of the impact in retail ratemaking of FERC's resolution of those questions. In the interest of the increasingly interstate character of power supply, access to the Federal courts should be available for the resolution of these retail rate impact issues. If the Federal courts are not available, local jurisdictions will be in a position to frustrate, in practice, decisions and policies made by FERC under the Federal Power Act and electric utility systems such as EUA and NSP will be left with unrecoverable "trapped costs."

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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